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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1 and 52

[FAC 2005-83; FAR Case 2015-006; Item II; Docket No. 2015-0006, Sequence No. 1]

RIN 9000-AM85

Federal Acquisition Regulation; Prohibition on Contracting with Inverted Domestic Corporations—Representation and Notification

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to require additional actions by contractors to assist contracting officers in ensuring compliance with the Governmentwide statutory prohibition on the use of appropriated (or otherwise made available) funds for contracts with any foreign incorporated entity that is an inverted domestic corporation or to any subsidiary of such entity.

DATES: Effective: **November 1, 2015.**

FOR FURTHER INFORMATION CONTACT: Mr. Michael O. Jackson, Procurement Analyst, at 202-208-4949, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202-501-4755. Please cite FAC 2005-83, FAR Case 2015-006.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published a proposed rule in the Federal Register at 79 FR 74558 on December 15, 2014, to revise the provisions of the FAR that address the continuing Governmentwide statutory prohibition (in effect since fiscal year 2008) on the use of appropriated (or otherwise made available) funds for contracts with any foreign incorporated entity that is an inverted domestic corporation (under section 835 of the Homeland Security Act of 2002, codified at 6 U.S.C. 395) or any subsidiary of such entity. The rule modifies the existing representation and adds a requirement to notify the contracting officer if the contractor becomes an inverted domestic corporation, or a subsidiary of an inverted domestic corporation, during performance of the contract.

One respondent submitted a comment in response to the proposed rule.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the comments in the development of the final rule. A discussion of the comments is provided as follows:

A. Summary of significant changes.

There is no change from the proposed rule in response to the public comment received.

B. Analysis of Public Comments.

Comment: The respondent stated that a particular contract is in violation of Federal law, because the contractor merged with a corporation outside the United States.

Response: The Councils are not enforcement agencies, and are not in a position to assess whether the merger of two companies resulted in an entity that meets all the criteria in the applicable definition of "inverted domestic corporation." This comment does not address the substance of the proposed rule, which proposed to require additional actions by contractors to assist contracting officers in ensuring compliance with the Governmentwide statutory prohibition on the use of appropriated (or otherwise made available) funds for contracts with any foreign incorporated entity that is an inverted domestic

corporation (under 6 U.S.C. 395) or to any subsidiary of such entity. Contractors with the modified clause in their contracts will be required to make a positive representation with the offer as to their status as an inverted domestic corporation, and notify the contracting officer if they become an inverted domestic corporation during contract performance, as defined in the statute. The contracting activity will take appropriate action if the contractor notifies the Government in accordance with the clause that it has become an inverted domestic corporation, or if investigation by the appropriate Government agency determines that the contractor became an inverted domestic corporation during contract performance and failed to notify the Government of its change in status.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing

rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD, GSA, and NASA certify that this rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because this rule will only impact an offeror that is an inverted domestic corporation or a subsidiary of an inverted domestic corporation and wants to do business with the Government. It is expected that the number of small entities impacted by this rule will be minimal. Small business concerns are unlikely to have been incorporated in the United States (or, if a partnership, established in the United States) and then subsequently incorporated in a foreign country; the major participants in these transactions are reportedly large multinational corporations. For the definition of "small business", the Regulatory Flexibility Act refers to the Small Business Act, which in turn allows the U.S. Small Business Administration (SBA) Administrator to specify detailed definitions or standards (5 U.S.C. 601(3) and 15

U.S.C. 632(a)). The SBA regulations at 13 CFR 121.105 discuss who is a small business: "(a)(1) Except for small agricultural cooperatives, a business concern eligible for assistance from SBA as a small business is a business entity organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor".

V. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. Chapter 35) applies. The rule contains information collection requirements. OMB has cleared this information collection requirement under OMB Control Number 9000-0190, titled: Prohibition on Contracting with Inverted Domestic Corporations—Representation and Notification.

List of Subjects in 48 CFR Parts 1 and 52

Government procurement.

Dated: June 18, 2015.

William F. Clark,
Director,
Office of Government-wide
Acquisition Policy,
Office of Acquisition Policy,
Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 1 and 52 as set forth below:

1. The authority citation for 48 CFR parts 1 and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

1.106 [Amended]

2. Amend section 1.106 in the table following the introductory text, by adding in numerical sequence, “52.209-10” and its corresponding OMB Control Number “9000-0190”.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

3. Amend section 52.209-2 by revising the date of provision and paragraph (c) to read as follows:

52.209-2 Prohibition on Contracting with Inverted Domestic Corporations—Representation.

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PROHIBITION ON CONTRACTING WITH INVERTED DOMESTIC CORPORATIONS—
REPRESENTATION (Nov 2015)

* * * * *

(c) Representation. The Offeror represents that—

(1) It ☐ is, ☐ is not an inverted domestic corporation; and

(2) It ☐ is, ☐ is not a subsidiary of an inverted domestic corporation.

(End of provision)

4. Amend section 52.209-10 by revising the date of the clause; and adding paragraph (d) to read as follows:

52.209-10 Prohibition on Contracting with Inverted Domestic Corporations.

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PROHIBITION ON CONTRACTING WITH INVERTED DOMESTIC CORPORATIONS (NOV 2015)

* * * * *

(d) In the event the Contractor becomes either an inverted domestic corporation, or a subsidiary of an inverted domestic corporation during contract performance, the Contractor shall give written notice to the Contracting Officer within five business days from the date of the inversion event.

(End of clause)

5. Amend section 52.212-3 by revising the date of the provision and paragraph (n)(2) to read as follows:

52.212-3 Offeror Representations and Certifications—Commercial Items.

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OFFEROR REPRESENTATIONS AND CERTIFICATIONS—COMMERCIAL ITEMS (NOV 2015)

* * * * *

(n) * * *

(2) Representation. The Offeror represents that—

(i) It ☐ is, ☐ is not an inverted domestic corporation; and

(ii) It ☐ is, ☐ is not a subsidiary of an inverted domestic corporation.

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6. Amend section 52.212-5 by revising the date of the clause and paragraph (a)(1) to read as follows:

52.212-5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

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CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE ORDERS—COMMERCIAL ITEMS (Nov 2015)

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(a) * * *

(1) 52.209-10, Prohibition on Contracting with Inverted Domestic Corporations (Nov 2015).

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[BILLING CODE 6820-EP]

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